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No. 92-2012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
JUL 7 1993
OFFICE OF THE CLERK

COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC., ET AL.,
Petitioners,

v.

THE COCA-COLA COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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July 7, 1993

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QUESTION PRESENTED

Did the Court of Appeals correctly determine under applicable state law that Petitioners were not entitled to compensatory damages for a breach of contract?

LIST OF PARTIES

Petitioners:

Coca-Cola Bottling Company of Elizabethtown, Inc. (also successor by merger to Coca-Cola Bottling Co. of Owensboro)

Wilmington Coca-Cola Bottling Works (also successor by merger to Newbern Coca-Cola Bottling Works)

Coca-Cola Bottling Company of Lehigh Valley (formerly known as Bethlehem)

Plymouth Coca-Cola Bottling Company, Incorporated

Sacramento Coca-Cola Bottling Co., Inc.

Coca-Cola Bottling Company of Shelbyville, Inc.

Coca-Cola Bottling Company of Dickinson

Laredo Coca-Cola Bottling Company

Coca-Cola Bottling Company of Williston

Coca-Cola Bottling Company of LaCrosse Arkansas-Georgia Company (also known as Nashville)

Coca-Cola Bottling Company of Streator

Natchez Coca-Cola Bottling Company

Coca-Cola Bottling Company of Jefferson City

Coca-Cola Bottling Company of Macon

Coca-Cola Bottling Company of Deming

Coca-Cola Bottling Company of Tulsa

Coca-Cola Bottling Company of Brownsville (RGV)

Coca-Cola Bottling Company of San Angelo

Coca-Cola Bottling Company of Tucson

Las Cruces Coca-Cola Bottling Company

Coca-Cola Bottling Company (Alexandria)

Coca-Cola Bottling Company of Marshall

The Cleveland Coca-Cola Bottling Company, Inc.

Central Coca-Cola Bottling Company, Inc.

Magnolia Coca-Cola Bottling Company, Inc.

Coca-Cola Bottling Co. of Jamestown

Love Bottling Company

Trenton Coca-Cola Bottling Co.

Respondent:

The Coca-Cola Company

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Respondent:

Montevideo Refrescos, S.A.

INTI S.A. Industrial y Comercial

Coca-Cola Amatil Limited

CC Amatil Investments C.V.

C-C Bottlers Ltd.

Olympus Industries, Inc.

Oasis Enterprises Ltd.

P.T. Coca-Cola Tirtalina Bottling Company

P.T. Coca-Cola Banyu Argo

P.T. Coca-Cola Pan Java Bottling Company

P.T. Coca-Cola Kendali Soto

H. & J. Schmitz G.m.b.h. & Co. KG

Respondent has ten additional foreign non-wholly owned subsidiaries.

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OCTOBER TERM, 1993

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v.

THE COCA-COLA COMPANY,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

Respondent The Coca-Cola Company ("Coca-Cola") respectfully opposes the Petition for Writ of Certiorari filed by Coca-Cola Bottling Company of Elizabethtown, Inc., *et al.* (the "Petitioners").

STATEMENT OF THE CASE

This diversity action is a contractual dispute between Coca-Cola and a small group of bottlers that still operate under 1921 contracts ("the bottle contract"). The bottle contract is unique: (i) Coca-Cola is required to sell Coca-Cola Bottlers Syrup ("bottle syrup") to Petitioners in perpetuity (Appendix to the Petition for Writ of Certiorari ("App.") at 21a); and (ii) Petitioners pay a fixed price that can be increased only if the "market price . . . as quoted" of sugar is above a specified level. (App. at 89a.)

Faced with ever increasing costs during the intervening 57 years and confronted with a need to expand its national advertising, Coca-Cola proposed an amendment to the bottle contract in 1978 that would give it some price relief ("the 1978 Amendment"). Coca-Cola was then using only sucrose from sugar cane and sugar beets in the production of bottle syrup. As a *quid pro quo* for a higher syrup price, Coca-Cola agreed that those bottlers signing the 1978 Amendment (the "amenders") would receive any savings it might realize from the use of a less expensive (but equally satisfactory) sweetener. (App. at 91a.) More than ninety-seven percent of the bottlers in the United States, by volume, ultimately agreed to the 1978 Amendment. (*Id.*) However, Petitioners refused to sign the amendment and instead continued to operate under the old 1921 contracts. (*Id.*)

In 1980, Coca-Cola began using a cheaper sweetener, high fructose corn syrup ("HFCS"), in bottle syrup. As provided in the 1978 Amendment, it immediately began to pass on the sweetener savings to the amenders, (App. at 92a), but not to the Petitioners and others who had not signed the 1978 Amendment.

The Petitioners filed this lawsuit in 1981. They asked for an injunction requiring Coca-Cola to continue to provide them with syrup sweetened only with sucrose; and *alternatively* they sought to receive the savings from the use of HFCS. (App. 242a-43a.)

In 1986 and 1987, the District Court held that the Consent Decrees issued by that court in 1921, upon which the bottle contract was based, required that bottle syrup be sweetened exclusively with sucrose from cane or beets —and not HFCS. (*See* App. at 265a.) In compliance with these rulings, Coca-Cola has furnished sucrose-sweetened syrup to the Petitioners since 1987. (App. at 27a-28a.) The amenders have continued to receive syrup sweetened with HFCS, as authorized by the 1978 Amendment.

At the District Court trial on the merits, it was shown without dispute that:

> (a) HFCS-sweetened syrup is identical in taste and quality to sucrose-sweetened syrup (App. at 59a);
>
> (b) Petitioners lost no sales or profits, and incurred no additional expenses, as a result of the receipt of HFCS-sweetened syrup during the years 1980-1987 (*Id.*), and Petitioners were thus in exactly the same economic position as they would have been in had sucrose-sweetened syrup been supplied (*Id.*);
>
> (c) Petitioners have consistently paid a lower price than the amended bottlers even after the amenders received the savings (App. at 26a); and
>
> (d) Petitioners have consistently paid less for their syrup than their main rivals, PepsiCo bottlers. (App. at 197a.)

Notwithstanding these undisputed factual findings, the District Court awarded approximately $20 million to Petitioners, including prejudgment interest, as damages on their *alternative* claim for the sweetener savings. (App. at 131a, ¶ 101.) The Third Circuit Court of Appeals (Judges Hutchinson, Alito, and Higginbotham), unanimously reversed this award of compensatory damages, and held that the bottlers were entitled to only nominal damages of $1 each because they had suffered no economic loss whatever. (App. at 50a-61a.)

The exact argument made by Petitioners in this Court, i.e., that the Court of Appeals failed to address one of the two breaches of contract found by the District Court, was raised by Petitioners in a Motion for Rehearing and Suggestion of Rehearing In Banc in the Third Circuit. (*See* Appendix A, hereto.) The motion was denied. (App. at 295a.)

This case presents only the question of whether Petitioners are entitled to compensatory damages for the

breach of a contract under applicable state law. The rulings in the District Court and the Court of Appeals will have no real significance as to other parties because the contract in question is unique. Petitioners are simply unhappy with the result and are asking this Court to substitute its judgment for that of the Court of Appeals.

MISSTATEMENTS OF FACT IN THE PETITION

The Petition for Writ of Certiorari contains several material misstatements of fact that require correction: first, that the Court of Appeals did not address "the particular breach which was the basis of the District Court's award of damages to Petitioners"; and second, that the Court of Appeals did not hold that the District Court erred as a matter of law and did not hold that any finding of fact by the District Court was clearly erroneous. These misstatements are briefly discussed below.

A. *The Court of Appeals Expressly Considered Each of the Two Breaches of Contract Relied Upon by the District Court in Awarding Compensatory Damages.*

Petitioners characterize the two breaches as a "substitution breach" and a "pricing breach." Petitioners acknowledge that the Court of Appeals properly addressed the substitution breach but they contend that it overlooked or ignored the pricing breach. Petitioners are wrong.

A reading of the opinion makes it clear that the Court of Appeals understood and carefully considered the pricing breach. For example, the court stated:

> The *price provision* in the Consent Decrees and the bottlers' contracts is linked entirely to the amount of sucrose used, not to any other type of sweetener. Were we to conclude that the contract includes any substitute sweetener, the syrup containing such substitute would be without a price because the parties never agreed on one. . . . [A] court cannot supply a *price* if the parties have not agreed on one or at least

> presented evidence from which the court could infer a reasonable price.

(App. at 60a) (emphasis added).

The Court of Appeals further stated:

> Contracting parties cannot share an intent about something they entirely failed to foresee. The bottlers have not produced any clear and convincing evidence that the parent bottlers mutually shared with the [Coca-Cola] Company an intention to provide the actual bottlers with the economic benefit of the technological advances that made possible a syrup produced with sweeteners other than sugar, in this case HFCS, comparable in quality to the syrup sweetened with cane or beet sugar. Though the bottlers rely heavily on language from *Coke III* [654 F. Supp. 1388 (D. Del. 1986) (App. 228a-44a)] they do not cite the following passage from that opinion: ". . . *it is the task of the parties, not of this Court, to refashion the agreement to reflect new developments.*"

(App. 46a-47a (emphasis added); *see also* App. 48a-50a for additional discussion by the Court of Appeals as to why Petitioners were not entitled to damages under the so-called "pricing breach.")

In response to Petitioners' argument that the pricing provisions of the bottle contract should be reformed, the Court of Appeals said:

> We therefore refuse the bottlers' invitation to set a price for syrup sweetened with ingredients other than sucrose. Again, this task is best left to the parties to the agreement, not a court.

(App. at 50a.) This Court should similarly refuse Petitioners' invitation.

B. *The Court of Appeals Found That the District Court Erred as a Matter of Law, and That the District Court Based Its Ruling on a Clearly Erroneous Finding of Fact, When It Awarded Compensatory Damages.*

The Court of Appeals stated at the outset of its legal analysis:

> Resolution of this issue requires application of some basic principals of the common law of contracts to the facts of this case. Therefore, we exercise *plenary review* over the district court's conclusion that the bottlers are entitled to compensatory damages measured by the benefit the Company received from using HFCS syrup.

(App. at 54a) (emphasis added).

The Court of Appeals concluded that the District Court erred as a matter of law by awarding to Petitioners the savings resulting from the use of the less expensive sweetener. The court stated that, "[*t*]*he district court's award measured by the benefit to the breaching party* is based in restitution and *cannot stand* in the face of the bottlers' abandonment of that theory." (App. at 59a) (emphasis added).[1]

Petitioners' argument that the Court of Appeals did not disapprove any finding of fact by the District Court (Petition at 16, 22-23) is also wrong. Petitioners claim that the Court of Appeals "endorsed" Finding of Fact

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[1] In their original complaint, Petitioners claimed the sweetener savings under an "unjust enrichment" theory. *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 98 F.R.D. 254, 261 (D. Del. 1983). They later conceded that "the existence of an express contract precludes an action in quasi-contract for unjust enrichment," and they abandoned that theory. (*Id.*) In view of this concession, the Court of Appeals correctly held that Petitioners were not entitled to recover under a restitution or unjust enrichment theory. (App. 55a.) Petitioners' effort, in footnote 9 at page 20 of the Petition, to repudiate the positon they took in the District Court cannot be countenanced.

No. 69 by the District Court. (Petition at 16.) In fact, the Court of Appeals actually said:

> To the extent, however, that Finding [of Fact] No. 69 implies that the Consent Decrees permit the [Coca-Cola] Company to use a syrup sweetened with anything other than sugar, *it cannot stand* because it conflicts with the earlier finding in *Coke III* that "the effective present meaning of the term 'sugar' in paragraph 10 is refined granulated sucrose from cane or beet, a definition that excludes HFCS-55."

(App. at 56a-57a) (emphasis added).

REASONS FOR DENYING THE WRIT

It is fundamental that the Supreme Court does not grant certiorari merely to correct alleged errors in lower court decisions. *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923) ("[J]urisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"); *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (Rehnquist, J.) ("[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); Robert L. Stern, *et al., Supreme Court Practice* § 4.17, at 221 (6th ed. 1986).

Denial of certiorari is particularly appropriate when the issue sought to be reviewed, as here, "turns solely upon an analysis of the particular facts involved, or *upon the construction of particular contracts or written instruments.*" Stern, *supra* § 4.14 at 217 (emphasis added); *see also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (The Court does not "sit for the benefit of the particular litigants"); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (The Court reviews "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties").

The Petitioners have cited no case, and Coca-Cola is aware of none, in which certiorari was granted in a diversity action involving the construction of a contract—much less a unique contract—as here.

Petitioners' sole alleged basis for granting the writ of certiorari is that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" under Rule 10.1(a) of the Rules of this Court. (Petition at 21.) This argument, unsupported by any case authority, is refuted by a simple reading of the opinion of the Court of Appeals. In a unanimous opinion that is seventy-one pages long in the Appendix, the Third Circuit carefully considered and correctly rejected every argument of the Petitioners.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should de denied.

Respectfully submitted,

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July 7, 1993

APPENDIX A

[Excerpt from Petition for Rehearing and Suggestion for Rehearing In Banc]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case Nos. 91-3496/91-3498

COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC., *et al.*
Appellants/Cross-Appellees,

v.

THE COCA-COLA COMPANY,
Appellee/Cross-Appellant.

PETITION FOR REHEARING
AND SUGGESTION OF REHEARING IN BANC

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Attorneys for
Appellants/Cross-Appellees

March 3, 1993

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and professional judgment, that this appeal involves a question of exceptional importance, to-wit: the panel has reversed the district court's award of more than $20 million in contract damages, while completely overlooking and failing to review the ground (breach of the *pricing* provisions of the plaintiffs' contracts) on which the district court expressly based its award.

This oversight violates the fundamental rule of appellate procedure that the appellate court should review fully all grounds on which the district court relied in its ruling. This oversight is particularly critical since the appellate court has sustained the district court's findings of fact as to the parties' intent upon which the conclusion of breach was based. Consideration by the full Court is, therefore, necessary to preserve the integrity of the process of appellate review.

This 2nd day of March, 1993.

/s/ Emmet J. Bondurant
EMMET J. BONDURANT
Attorney for Appellants

* * * *